No. 96.

Brf. of Dudley, Michener & Allen for P. C.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

Filed Oct. 29, 1898.

No. 96.

THE BELLINGHAM BAY AND BRITISH COLUMBIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW WHATCOM, DEFENDANT IN ERROR.

October Term 1897, No. 355.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AND BRIEF FOR PLAINTIFF IN ERROR.

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STATEMENT.

In July, 1890, the former City of New Whatcom, Washington, ordered the improvement of Elk Street between Elk Street East and North Street (a distance of nine blocks in length). (*Printed record, 18, 45, 46, 56.*)

It let the contract therefor in August, 1890. (*Printed record, 18, 46, 56.*) This contract was completed and the improve-

ment accepted by the former city of New Whatcom. (*Printed record, 18, 46, 56.*)

In October, 1890, the former city of New Whatcom levied the first or former assessment upon the abutting property. (*Printed record, 18, 46, 56, and "warrant of collection" on back exhibit E, Printed record, 112.*)

January 7th, 1891, this assessment purported to become delinquent. (*Printed record, 35.*)

February 16, 1891, the present city of New Whatcom became the lawful successor of the former cities of Whatcom and New Whatcom. (*Printed record, 17, 34, 45.*)

September 1st, 1892, the present city of New Whatcom filed its amended complaint in the Superior Court of Whatcom County, State of Washington, in a suit therein pending, entitled City of New Whatcom, plaintiff, vs. E. F. G. Carlyon, J. E. Baker and Olive Baker, defendants. The object of this suit was to obtain a decree foreclosing the lien alleged to have been created by the former assessment, as against one lot in block one hundred and forty, and six lots in block one hundred and forty-three, the property of the defendants. (*Printed record, 33 to 36, and exhibit E.*)

The Superior Court, on January 13th, 1894, entered its findings, conclusions and decree annulling the assessment, in so far as the same appertained to the property of the defendants involved in that action. (*Printed record, 45, 47, 48.*)

The Supreme Court affirmed this decree February 14th, 1895. (*Printed record, 48.*)

Plaintiff in error was not a party to this suit, nor was any of its property involved therein. A description of its property

is contained in the findings of the trial court in the case at bar. (*Printed record, 19.*)

The re-assessment act was approved March 9th, 1893. (*Laws of Washington, Session of 1893, pages 226 to 231*). Section 1 of said act is as follows:

"Section 1. That whenever an assessment for laying out, establishing, closing, straightening, altering, widening, grading, re-grading, paving, re-paving, planking, re-planking, side-walking and bridging, macadamizing, re-macadamizing, graveling, re-graveling, piling, re-piling, capping, re-capping, any street, avenue or alley, or for any local improvement, which has heretofore been made or which may hereafter be made by any city or town, has been or may be hereafter declared void and its enforcement under the charter or laws governing such city or town refused by the courts of this state, or for any cause whatever has been heretofore or may be hereafter set aside, annulled or declared void by any court, either directly or by virtue of any decision of such court, the council of such city or town shall, by ordinance, order and make a new assessment or re-assessment upon the lots, blocks or parcels of land which have been or will be benefited by such local improvement, to the extent of their proportionate part of the expense thereof, and in case the cost shall exceed the actual value of such local improvement the new assessment or re-assessment shall be for and based upon the actual value of the same at the time of its completion; and to this end the board of public works or other proper authority of such city or town shall make a new assessment roll in equitable manner with reference to the benefits received, as near as may be in accordance with the law in force at the time such re-assessment is made, and when the same shall have been confirmed and approved by the council it shall be enforced and collected in the same manner that other assessments for local improvements are enforced and collected under the charter or laws governing such city or town; but all proceedings relative to making the expense of local improvements charge-

able upon property benefited thereby, required and provided by the charter or laws of such city or town, prior to the making of original assessment roll, shall not be included nor required within the purpose of this act."

Plaintiff in error is a private corporation existing under the laws of the State of California, and authorized to transact business in the State of Washington. (*Printed record, 17.*)

Defendant in error is a city of the third class (*Printed record, 17*) and its ordinances do not take effect until five days after their publication. (*1 Ballinger's Codes and Statutes of Washington, Sec. 936.*)

Ordinance No. 301 was passed March 18th, 1895, and approved March 19th, 1895. (*Printed record, 18.*) From the printed record, page 55, it might be inferred that this ordinance was not published until February 12th, 1896. We believe this to be an error, as we understand it was published March 20th or 22d, 1895.

This ordinance in no manner relates or purports to relate to the improvement in controversy. It is merely a general ordinance for the purpose of supplementing the re-assessment act, and prescribing the procedure to be followed in the event of a re-assessment of any street becoming necessary.

Ordinance 306 was passed June 10th, 1895, approved June 11th, 1895, and published June 18th, 1895. (*Printed record, 18, 57.*)

This is the ordinance ordering the re-assessment in controversy. There is, however, nothing in this ordinance, provisionally or otherwise, making any *levy* against the property to be assessed, and there is therein no time or place designated when or where objections can be filed or heard.

After ordering the re-assessment, the various steps leading up

to its levy were taken, as recited in ordinance 310, (*printed record 58-59*), between June 18th, 1895, and July 22d, 1895, at which last named date the re-assessment was levied. (*Finding 10, printed record, 19, also 58-59.*)

Notice of the time and place objections to the proposed re-assessment might be filed was published in a daily newspaper in its issues of July 9th, 10th and 11th, 1895, respectively, and are set forth in said Ordinance No. 310, as follows:

"Whereas, said city council did on the 8th day of July, 1895, order said assessment-roll filed in the office of the city clerk, and fixed Monday, July 22d, 1895, at 7:30 p. m. as a time at which they would hear, consider and determine any and all objections to the regularity of the proceedings in making such assessment, or to the amount to be assessed upon any block, lot or tract of land for said improvement, and

Whereas, notice of such hearing was duly published in the official paper of the city of New Whatcom, to-wit: in the Daily Reveille, in three consecutive issues thereof, the same being the issues of July 9th, 10th and 11th, 1895;" (*Printed record, 11, 58-59.*)

Under the act, all objections must be filed within ten days from the last publication of the notice or they will be barred. Only those filing objections can appeal from the decision of the council. As to all others, its decision conclusively establishes the regularity, validity and correctness of the re-assessment. (*Laws, 1893, pages 228 to 230, Secs. 4 to 5 and 8.*) These sections are as follows:

"Sec. 4. Upon receiving the said assessment roll the clerk of such city or town shall give notice by three (3) successive publications in the official newspaper of such city or town, that such assessment roll is on file in his office, the date of filing of same, and said notice shall state a time at which the council will hear and consider objections to said assessment roll by the

parties aggrieved by such assessment. The owner or owners of any property which is assessed in such assessment roll, whether named or not in such roll, may within ten (10) days from the last publication provided herein, file with the clerk his objections in writing to said assessment.

"Sec. 5. At the time appointed for hearing objections to such assessment the council shall hear and determine all objections which have been filed by any party interested, to the regularity of the proceedings in making such re assessment and to the correctness of the amount of such re-assessment, or of the amount levied on any particular lot or parcel of land; and the council shall have the power to adjourn such hearing from time to time, and shall have power, in their discretion, to revise, correct, confirm or set aside, and to order that such assessment be made *de novo*, and such council shall pass an order approving and confirming said proceedings and said reassessment as corrected by them, and their decision and order shall be a final determination of the regularity, validity and correctness of said re-assessment, to the amount thereof, levied on each lot or parcel of land. If the council of any such city consists of two houses the hearing shall be had before a joint session, but the ordinance approving and confirming the reassessment shall be passed in the same manner as other ordinances."

"Sec. 8. Any person who has filed objection to such new assessment or re-assessment, as hereinbefore provided, shall have the right to appeal to the superior court of this state and county in which such city or town may be situated."

September 23, 1895, the re-assessment purported to become delinquent (*Printed record, 19*), and on April 14th, 1896, suit was instituted in the Superior Court of Whatcom County, State of Washington, by defendant in error against plaintiff in error, to foreclose the liens alleged to have been created by the reassessment, aggregating, against the property of the plaintiff in error, the sum of $221.00. (*Printed record, 1 to 5, inclusive.*)

Plaintiff in error appeared and filed seven separate answers to the complaint. The sixth separate answer set up the form of the notice given of the time and place objections could be filed and heard. This answer also avers that neither the plaintiff in error nor any of its officers were ever in any manner given any notice of the proceedings set out in the complaint of the defendant in error; and that the only notice ever given was a constructive notice published in three consecutive issues of a daily newspaper printed in the City of New Whatcom. By reason of the premises, it is in such answer specially set up that the proceedings had by the defendant in error and set up in its complaint are in violation of the rights secured to the plaintiff in error under the fourteenth amendment to the Constitution of the United States. (*Printed record, 11, 12 and 13.*)

Defendant in error's motion to strike, as no defense to its suit, the fourth, fifth and sixth separate answers was by the trial court sustained; to which ruling plaintiff in error excepted. (*Printed record, 14, 15 and 16.*) Thereupon a trial was was had of the issues raised by the first, second, third and seventh separate answers, and the trial court made its findings of fact, conclusions of law and entered its decree in favor of defendant in error. (*Printed record, 17 to 20, and 22-23.*)

Plaintiff in error then appealed to the Supreme Court of the State of Washington, it being the court of last resort in said state. In said court the plaintiff in error urged that the trial court erred in not sustaining the contention of plaintiff in error that the proceeding had by the defendant in error, as set out in its complaint, was in violation of section 1 of amendment 14 of the Constitution of the United States. This contention was also overruled by the Supreme Court of the State of Washington, (*Printed record, 61, 62, 63, 64, 77*), and thereupon

the plaintiff in error sued out its writ of error to this court, and filed therein its assignment of errors. (*Printed record, 69 to 76, inclusive.*)

Plaintiff in error bases its rights upon the following

ASSIGNMENT OF ERRORS.

First—That the Supreme Court of the State of Washington erred in sustaining the Superior Court of Whatcom County, State of Washington, in its order and ruling by which it sustained the motion of the defendant in error to strike from the answer of the plaintiff in error to the complaint of the defendant in error the sixth separate answer thereof filed in said Superior Court of Whatcom County, Washington, which motion was sustained by the sustaining of the validity of the statute of the State of Washington, to-wit, section 4 of Chapter XCV of the laws of said state, enacted at a session of the legislature of said state held in the year 1893, which said section is found on page 228 of the said session laws for the year 1893, the validity of which said statute was drawn in question by the said sixth separate answer, said motion, said order and ruling, and the exceptions taken, for the reason that said statute is repugnant to section 1 of amendment 14 of the Constitution of the United States, in that it deprives the plaintiff in error of its property without due process of law.

Second—That the Supreme Court of the State of Washington erred in sustaining the Superior Court of Whatcom County, State of Washington, in its order and ruling by which it sustained the motion of the defendant in error to strike from

the answer of the plaintiff in error the sixth separate answer to the complaint of the defendant in error filed in the Superior Court of Whatcom County, Washington, which motion was sustained by the sustaining of the authority exercised by the defendant in error under the statute of the State of Washington, to-wit: Chapter XCV of the laws of said state enacted at a session of the legislature of said state held in the year 1893, which said act is found in the session laws of said state for the year 1893, at pages 226 to 231, inclusive, the validity of which authority so exercised by defendant in error under said chapter of said session laws was drawn in question by said sixth separate answer, said motion, said order and ruling, and the exceptions taken, for the reason that said authority so exercised under said chapter of said acts and said chapter is each repugnant to section 1 of amendment 14 of the Constitution of the United States, in that the said authority by the defendant exercised under said chapter of said acts deprives the plaintiff in error of its property without due process of law.

Third—That the Supreme Court of the State of Washington erred in sustaining the Superior Court of Whatcom County, State of Washington, in its findings, conclusions and decree, both upon the facts and upon the law, in finding that due, legal and sufficient notice to the plaintiff in error was given of the time and place of the meeting of the Council of defendant in error mentioned in the tenth finding of fact made by the said Superior Court, which said findings, conclusions, and decree were drawn in question by the sustaining of the validity of Chapter XCV of the Session Laws of the State of Washington for the year 1893, found at pages 226 to 231, inclusive, of the laws of said state for the year 1893, and by the sustaining of the validity of the authority exercised by the defendant in

error under said statute, the validity of which statute and the validity of the authority exercised thereunder by the defendant in error were drawn in question by said findings, conclusions, and decree, for the reason that said statute and the said authority exercised thereunder is each repugnant to section 1 of the 14th amendment of the Constitution of the United States, in that the same and each of the same deprives the plaintiff in error of its property without due process of law.

Fourth—That the Supreme Court of the State of Washington erred in its finding, conclusion, and decree, upon the facts and upon the law, in finding that the notice of the filing of the assessment roll given by the defendant in error was not in fact the only notice of the proceedings, and in holding that the ordinance providing for the re-assessment was some notice of the proceedings and should have some bearing in determining the sufficiency of the notice given in considering the length of time allowed for filing objections, which said finding, conclusion, and decree were drawn in question by the sustaining of the validity of Chapter XCV of the session laws passed by the legislature of said state in the year 1893, and found in said session laws at pages 226 to 231, inclusive, and by the sustaining of the validity of the proceedings had and the authority exercised under said act by the defendant in error, the validity of which act, proceedings, authority and ordinance was drawn in question by the sixth separate answer of the plaintiff in error, and by the exceptions taken to such finding, conclusion, and decree, for the reason that said statute and the authority exercised thereunder is each repugnant to section 1 of amendment 14 of the Constitution of the United States, in that the same and each of the same deprives plaintiff in error of its property without due process of law.

Fifth—That the Supreme Court of the State of Washington

erred in sustaining the Superior Court of Whatcom County, Washington, in its order and ruling by which it sustained, both upon the facts and upon the law, the said Superior Court of Whatcom County, State of Washington, in finding, establishing and decreeing valid the several liens in favor of the defendant in error and against the plaintiff in error set out in the decree of the said superior court, all of which was done by sustaining the validity of Chapter XCV of the Session Laws of 1893, which said chapter is found in said Session Laws of the State of Washington, at pages 226 to 231, inclusive, and by sustaining the validity of the authority exercised thereunder by the defendant in error, the validity of which said statute and the validity of which said authority so exercised thereunder was drawn in question by said order, rulings, findings of fact, conclusions of law and decree, and exceptions thereto, for the reason that the same and each of the same is repugnant to section 1 of amendment 14 of the Constitution of the United States, in that the same and each of the same deprives plaintiff in error of its property without due process of law.

ARGUMENT.

Plaintiff in error, having in its sixth separate answer expressly invoked the protection of the fourteenth amendment of the Constitution of the United States, a federal question is properly presented and the jurisdiction of this court is unquestioned.

Chicago, B. & Q. R. Co. vs. City of Chicago, 17 Sup. Ct. Rep., 581.

Backus vs. Fort St. Union Depot Co., 18 Sup. Ct. Rep., 445, 448.

Plaintiff in error did not lose its right to urge the error of the trial court in sustaining the motion to strike its sixth separate answer by going to trial upon its general denial.

Scott vs. Hallock, 16 Wash., 439.

It appears from the record in this cause that the improvement in question was constructed, and the abutting property originally assessed, in the years 1890. No proceedings were ever instituted to collect the original assessment against any of the property of the plaintiff in error, and it was never made a party to any suit to collect any portion of the original assessment.

In 1892, one Carlyon, Baker and wife were made parties to a suit to collect the original assessment, as against certain lots owned by them. In 1895, the Supreme Court affirmed the judgment of the trial court, holding the original assessment as to the property of Carlyon, Baker and wife, void. Under the re-assessment act (*Laws 1893, page 226*) a re-assessment could be had whenever an assessment had been either directly or indirectly set aside by any court of competent jurisdiction.

As a result of the Carlyon-Baker suit, the city proceeded to re-assess all of the property included in the former assessment district. This re-assessment was initiated by the passage of ordinance No. 306, in June, 1895, being a period of five or six years after the completion of the improvement and the levying of the former assessment.

The only notice ever given of the re-assessment was by a publication for three successive issues in a daily newspaper of a notice, the form of which is set out in the sixth separate answer above referred to.

The main contention in this cause is, that owing to the nature of the re-assessment proceeding, the form of the notice,

and the period of its publication, the time allowed in which to appear under the notice is too unreasonable to constitute due process of law within the meaning of section 1 of the 14th amendment to the Constitution of the United States.

Before presenting authorities upon this point, we desire to advert to certain language contained in the opinion of the Supreme Court in its decision in this case. At page 62 of the printed record, the Supreme Court says:

"It appears that the appellant has been contesting the proceedings to collect the cost of these improvements for several years past, and that no hardship has resulted in consequence of the shortness of time prescribed."

We are at a loss to account for this language, for the reason that there is no finding contained in the record, nor any evidence upon which such finding could be made, supporting the assertion that appellant (plaintiff in error) has been contesting the proceedings to collect the cost of these improvements for several years past. If such finding had been made, we are aware that this court would not review the evidence for the purpose of ascertaining its correctness. In the absence, however, of any testimony or finding, we think the expression of the court, last referred to, falls within the rule announced by this court in the case of *Stone vs. United States, 164 U. S. 380, 383.* In that case the court uses this language:

"We are not at liberty to refer to the opinion for the purpose of eking out, controlling, or modifying the scope of the findings."

The same is also true of the language used in the opinion to the effect that no hardship has resulted in consequence of the shortness of time prescribed. If it be true, as alleged in the fourth separate answer, that the property in controversy is not assessed on the basis of the benefits received; and if it be further

true that plaintiff in error is estopped from offering proof as to these matters in the foreclosure proceedings by reason of not having presented the same to the Council, serious hardship has resulted by reason of the shortness of the time allowed in which to file objections before the Council.

The tenth finding of fact made by the trial court (*Printed record, 19*) finds that the Council acted upon the re-assessment roll "after due and legal notice of the time and place of such meeting."

From Ordinance No. 310 (*Printed record, 58-59*) it appears that the official paper of the city of New Whatcom, in which the notice in question was published, was a daily newspaper, and that the publication of the notice was contained in the issues of such paper published July 9th, 10th and 11th, in the year 1895. The form of the notice is not contained in any portion of the record by the trial court allowed to stand, but is set forth in the said sixth separate answer which was stricken out on motion by the trial court. This recital is in the nature of an admission binding upon the city.

State ex rel. vs. Gloyd (*Wash.*), *44 Pac. Rep., 103-104.*

It is not claimed that there is any evidence of a different notice of the hearing being given, or of the same being published for a greater length of time than as set forth in said sixth separate answer of plaintiff in error.

The motion to strike, as no defense to the suit, the sixth separate answer, in legal effect, admits the notice therein pleaded to be the only notice ever given of any of the matters pleaded in the complaint. All the evidence and record, before both the trial and supreme courts, is contained in the printed record in the case at bar. (*Printed record, 28, 60, 77.*)

The tenth finding on this subject, to which plaintiff in error excepted (*Printed record, 20, 21*), must therefore be considered in the nature of a legal conclusion on the part of the trial court, that the notice given and published as stated, was sufficient to meet the requirements of due process of law, and was the only notice, unless it be such notice, if any, as was imparted by the ordinances.

We shall first consider the sufficiency of the notice given irrespective of the ordinance referred to in the opinion of the supreme court.

NOTICE.

It is too well settled to require a lengthy citation of authorities, that in local assessment proceedings of the character in question, notice to the person whose property may be affected by the local assessment, and an opportunity to appear and contest the legality, justness and correctness of the assessment at some stage of the proceedings before it becomes final, are necessary to constitute due process of law.

Stuart vs. Palmer, 74 N. Y., 183.
Violett vs. City Council of Alexandria (Va.), 31 L. R. A., 382, and cases cited.

It is also well settled that in such local assessment proceedings, the same being an exercise of the taxing power, and not of the power of eminent domain, constructive notice by publication is sufficient to constitute due process of law.

Lent vs. Tillson, 11 (U. S.) Sup. Ct. R., 825-30-31.
Paulson vs. City of Portland, 13 (U. S.) Sup. Ct. R., 750-2.

The re-assessment act in question provides for two notices to the property owner; first, the notice of filing with the city clerk of the assessment roll, as contained in section 4 of the act. Second, by the provisions of an act found on page 161 of the acts of 1893, liens for street assessments are to be foreclosed according to the code of civil procedure, which, of course, necessitates notice in the court before foreclosure proceedings can be had.

The re-assessment act undertakes to make the hearing had before the council, pursuant to the notice provided in section 4, in the absence of an appeal, a final determination of the regularity, validity and correctness of the re-assessment to the amount thereof levied on each lot or parcel of land.

Section 8 limits the right of appeal to the superior court for the purpose of reviewing the action of the council to those persons who have filed objections before the council in the manner prescribed in said section 4.

The supreme court has sustained this construction of the statute.

Northwestern, etc., Bank vs. Spokane, 18 Wash. 456.

Section 4 of this act (*supra*) provides that the town or city clerk shall give notice by three successive publications in the official newspaper of the town or city stating therein that the assessment roll is on file in his office, and that at the time named the council will hear and consider objections to such roll by the parties aggrieved by the assessment. The owner of property is by statute given ten days after the last day of publication within which to file his objections in writing to the assessment. The record shows the official newspaper was a daily paper, and the publication of notice was made for three successive days. We submit that a notice that is final

and conclusive upon the property owner as to all questions save the jurisdiction of the tribunal to make the assessment is so short and so barely constructive as not to be a notice at all. While we concede in the first instance to the legislature the authority to prescribe the time of the notice, we assert that this is not an absolute authority relieved from judicial review. The shortening of the time and the limiting of opportunity to be informed through constructive notice may be such as to render the notice unavailing for the purpose for which notice is designed. If that be the case it is not notice. To prescribe that within ten days after the contingency of a three days' publication the landowner is left without redress for any kind of burden that may be placed upon his property in the way of taxation amounts to a taking of property without due process of law. Under the pretence of prescribing and regulating notice, all practical notice cannot be taken away. There is a limit to legislative power in shortening the time of notice, and if that limit is transcended the courts will hold it void.

As stated by Mr. Justice Miller in the case of *Davidson vs. New Orleans, 96 U. S., at page 104*, courts have uniformly refused to define the term due process of law, but have committed the "ascertaining of the intent and application of such an important phrase in the federal constitution, by the gradual proeess of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."

Again, in the concurring opinion in the same case, delivered by Mr. Justice Bradley, he uses the following language:

"The article is a restraint on the legislative, as well as on the executive and judicial, power of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will. I think, therefore, we are entitled, under the fourteenth amendment, not only to

see that there is some process of law, but 'due process of law,' provided by the state law when a citizen is deprived of his property; and that, in judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

The language of Justice Bradley, above quoted, has frequently been cited with approval by this court.

In *Railroad Commission Cases, 116 U. S. 307*, at page 331, this court said:

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

While in *St. Louis & San Fran. Ry. Co. vs. Gill, 156 U. S. 649*, the court states the law as follows:

"This court has declared in several cases, that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their prop-

erty without due process of law, and as depriving them of the equal protection of the laws." Pages 657, 658.

Hager vs. Reclamation District (*U. S.*), *4 Sup. Ct. R., 667.*
Lent vs. Tillson, 11 (*U. S.*) *Sup. Ct. R., 830.*
Regan vs. Farmers' Loan & Trust Company, 154 U. S., 362.
Smyth vs. Ames, 18 Sup. Ct. R., pp. 418, 424.

Section 4 of the re-assessment act provides as follows:

"Upon receiving the said assessment roll the clerk of such city or town shall give notice by three (3) successive publications in the official newspaper of such city or town, that such assessment roll is on file in his office, the date of filing of same, and said notice shall state a time at which the council will hear and consider objections to said assessment roll by the parties aggrieved by such assessment. The owner or owners of any property which is assessed in such assessment roll, whether named or not in such roll, may within ten (10) days from the last publication provided herein, file with the clerk his objections in writing to said assessment."

As we have seen from the record in this case, the only notice given was notice published for three consecutive days, in a daily newspaper; and within ten days from the date of the last publication all objections must be on file.

Since the notice provided for by the re assessment act, as construed by the Supreme Court of this state, is held to be sufficient to confer jurisdiction, then a lot owner, whether he has knowledge of such notice or meeting or not, is absolutely precluded from thereafter contesting the regularity, validity and correctness of the re-assessment, such right being alone accorded to those who have appeared, filed objections and appealed.

We respectfully submit that under the peculiar facts sur-

rounding re-assessment proceedings, such notice is not suitable or admissible in such cases, and that the same is arbitrary, oppressive and unjust, and should be declared not to constitute due process of law.

Under the act in question a lot owner may have paid his prior assessment. The former assessment may possibly be declared void in a proceeding to which neither he nor his property is a party, and of which he is in no way chargeable with notice. There are no overt acts of improvement, possession or otherwise, such as attended the original improvement of the street, to place him upon his inquiry, or charge him with notice. Resting in the security afforded him by the payment already made, and in the belief in the validity of the prior assessment, evidenced by such payment, he is in no manner guilty of neglect or other laches in failing to expect a re-assessment, or to be on the watch for the same. The validity of the act depends not upon the fact that the owner may by chance have notice, or that he may as a matter of favor have a hearing. The law must require sufficient notice and give him a fair opportunity to be heard. The act is to be tested, not by what has been, but by what may be done under it.

Stuart vs. Palmer, 74 N. Y., 183.

As before indicated, a failure to file objections at the hearing before the council, where the notice has been given, as required by the act, operates in the nature of a limitation upon the right of a lot owner to thereafter contest either the regularity, validity or correctness of the re-assessment proceedings.

An instructive case upon this point is that of *Hayes vs. Douglas County (Wis.), 65 N. W. Rep. 486 (31 L. R. A., page 213)*, decided December, 1895, wherein it was held that a stat-

ute making the issue of improvement bonds conclusive of the validity of an assessment, and permitting the issue of bonds without actual notice to the owners of the property assessed, or upon published notice only, within forty days after the assessment is finally determined, is unconstitutional, as providing for deprivation of property without due process of law.

The following language is used on page 486:

"The contract may be let after publication of notice for bids for one week. After the contract has been let, the improvement bonds may be issued after thirty days notice by publication in a newspaper. No actual notice is provided for, and the bonds may be issued before the work is commenced. So that, if the statute is sustained as a valid limitation, its bar may be complete within forty days after the assessment is finally determined, and regardless of the fact whether the owner has acquired actual knowledge of the proceedings against his property. These are proceedings whereby property is to be taken *in invitum*. No man's property can be lawfully taken or taxed but by due and regular process of law; nor forfeited except by his own omission seasonably to assert his right. * * * All statutes of limitation proceed upon the theory that the party has forfeited his right to assert his title, in the law, by lapse of time and omission to assert it. This necessarily presupposes that a full and fair opportunity has been afforded him to try his right in the courts; for it cannot justly be considered that he is in default and laches until such just opportunity has been afforded him, and he has failed to avail himself of it. Any attempt to cut off his right without having afforded him such just and reasonable opportunity is not properly a statute of limitations at all. It savors rather of spoliation and plunder. Cooley, Const. Lim., 6th Ed., 449. No doubt under a statute which provides for actual notice to the owner, a shorter limitation could be held reasonable than where constructive notice only is provided. Under this statute, many an owner may, without fault, be without actual knowledge of the pendency of

proceedings against his property, until the bar of this statute has foreclosed his right; and this may all well happen before any work, such as might arrest the attention of resident owners, is actually commenced under the contract. It is not questioned that all the proceedings relating to the assessment may be supported on notice by publication only; but *the fact that the notice provided for is constructive only is an element proper to be considered in determining whether the time limited affords reasonable opportunity for the owner to assert his right. No doubt such time should be allowed as would give a reasonable chance to acquire actual knowledge of the pendency of proceedings against his property, and to ascertain and assert his rights.* No absolute rule can be laid down as to what length of time will be deemed reasonable for the government of all cases alike. Different circumstances require different rules. What would be reasonable in one class of cases would be entirely unreasonable in another. *Wheeler vs. Jackson, 137 U. S. 245-255, 34 L. ed. 659-663.* While it is no doubt convenient and desirable, on the part of the municipality, that all questions in respect of the validity of such proceedings shall be put at rest as soon as may be, still there is no such exigency as to justify even an apparently unfair abbreviation of the rights of property owners or undue advantage taken. *The time allowed should be ample to afford a reasonable probability that he would become informed of the proceedings against his property, and be fairly able to assert his right, before it is finally barred.* It is considered that, plainly, this statute does not afford such reasonable opportunity, and cannot be sustained as a valid limitation. A short statute of limitation is not an allowable substitute for due process of law. It is utterly subversive of that constitutional protection to private rights of property."

We respectfully submit that under proceedings of the character in question, which, as before suggested, may in many instances be had against property owners who have already paid their prior assessments, who were not parties, either in person or in property, to the action in which the prior assess-

ment was declared void, to absolutely cut off their right to contest either the validity, regularity or correctness of the re-assessment proceedings upon a publication in three successive issues of a daily newspaper, is, in the language of this court, "arbitrary, oppressive and unjust," and furnishes no reasonable opportunity to acquire knowledge of the pendency of such proceedings, or to assert before the council their rights therein.

We know of no notice by publication in any analogous proceedings under the statutes of this state where the period of publication is so short, and the opportunity to appear and be heard so brief, as in the notice provided in the re assessment act under consideration.

Even in the general revenue law, where a time certain is fixed by the act at which the county treasurer will apply to the superior court for judgment on the delinquent tax rolls, notice by publication is required to be given once each week for three successive publications, the last of which shall be at least one week prior to the date fixed in such advertisement of such intended application.

Laws of 1895, pages 521-2, secs. 23-4.

In the revenue law, the time at which the application for judgment will be made to the court being fixed by the statute, it is unnecessary to give any notice thereof to constitute due process of law.

Kentucky Tax Cases, 115 U. S., 335-6; (s. c.) 6 Sup. Ct. R., 57.

Pittsburg C. C. & St. L. Ry. Co. vs. Bacus, (U. S.) 14 Sup. Ct. Rep. 1114.

Notwithstanding this fact, however, the legislature has provided for the notice above referred to.

It may be urged that if the provisions of section 4 of the re-assessment act are insufficient to constitute due process of law, that the notice served upon the property owners in the foreclosure proceedings is sufficient to constitute due process of law.

Before this contention can be supported, the defendant in such foreclosure proceeding must have an opportunity of contesting the charge thus imposed and presenting any defense going either to the regularity, validity or correctness of the assessment, and the amount thereof.

Hager vs. Reclamation District, (U. S.) 4 Sup. Ct. R., at pages 668-9, and cases cited.

We have already presented our views relative to the sufficiency of the notice, in so far as the time and manner of its publication are concerned. We have seen that the same is unreasonably short, and in that respect fails to meet the requirements of due process of law.

Should this contention be not sustained, we respectfully submit that the circumstances attending the publication of this notice make it imperative that its form should be of such a character as to readily apprise property owners of the nature of the pending proceedings. The notice fails to describe any property to be assessed, and is addressed to no property owner by name. It is headed "Special levy of the expense of local improvement district No. 4 'A' on Dock Street from Holly to Willow street." This is the first time any such pretended description is called to the notice of a property owner. It has never theretofore appeared in any of the proceedings connected with the improvement of the street, or in any petition or other record connected with the improvement or assessment of the street, save and excepting in the ordinance providing for the

re-assessment, which ordinance in this case was published but once, on February 11th, 1896. (*Printed record, 64.*)

On the sufficiency of the form of such notices in general, see the following authorities:

State vs. City of Elizabeth, 37 N. J. L., 335, 356-7.
State vs. Mayor and Council of Newark, 31 N. J. L. 360-64.
Keen vs. Asch, 27 N. J. Eq., 57.
Gatch vs. Des Moines, 63 Ia. 718, (s. c.); 18 N. W., 310-12-13.
White vs. Smith, 68 Ia. 718, (s. c.); 25 N. W. 115.
Trustees vs. Davenport, 65 Ia. 633, (s. c.); 22 N. W. 904.
24 Central Law Journal, 592, secs. 9 and 12.
Wade on Notice, 2d Ed., secs. 1109-1110 and cases cited.
Burg vs. C. M. & St. P. Ry. Co. 65 Ia. 404, (s. c.); 21 N. W. 767.

We desire to here notice some of the principal cases relied upon by the defendant in error in the Supreme Court of this state.

The case of Paulson vs. City of Portland, 13 Sup. Ct. Rep., is not in point, it being expressly stated, at page 753 of the opinion, that neither the form of the notice nor the time of its publication was disclosed by the record.

The case of Gilmore vs. Henting (Kan.), 5 Pac. Rep. 792, was much relied upon by the defendant in error. We desire, briefly, to distinguish that case from the one at bar. In that case, by ordinance published September 8, 1883, a special levy was provisionally made; a notice of the hearing of complaints by the council on the evening of September 24, 1883, was published September 22d, and 24th, respectively, and an ordinance making a final levy was published October 16, 1883. *The tax could not become a fixed and established charge or lien upon the property taxed prior to November 1, 1883.*

Under the express terms of that decision property owners for a period of fully *thirty-seven* days after the meeting of the council of September 24, and after the action of said council at such meeting, could apply to the council to make corrections or changes in their taxes, or commence an action to enjoin all further proceedings, or for some other sufficient and adequate relief. *No particular form or manner of giving notice was required under the law and facts of that case,* and the court only held the combined notice in the two ordinances (in each of which an assessment was levied), and the published notice, *probably sufficient.*

In that case the tax became a fixed and established charge or lien upon the property on November 1, 1883, but notwithstanding that fact, the tax was set aside in an action instituted *March 11, 1884,* for the reason that no detailed estimate, under oath, had been filed by the city engineer, and because the one filed was in excess of the estimated cash cost of the work.

In the case at bar, ordinance 320 made no levy whatever, and no intimation is therein given what amount will be assessed against any particular description of property, or when, if ever, the council will meet to hear objections to the same.

When the council does meet (under the present holding of the Supreme Court of this State), its decision is to be a final determination of the regularity, validity and correctness of the re-assessment, to the amount thereof, levied on each lot or parcel of land. The tax becomes a fixed and established charge. No opportunity is thereafter afforded, as in the case of Gilmore vs. Hentig, *supra,* of contesting either the regularity, validity or correctness of the same.

From the doubtful sanction given by the court to the sufficiency of the notice in Gilmore vs. Henting, we are confident

had the facts in that case been similar to those in the case at bar, a different holding would have followed.

It is not necessary, in order to set aside the proceedings in question, to hold the re-assessment act invalid in its provisions relating to notice. A proper construction of section four would authorize a selection by the council of an official paper, having periods of publication sufficiently far apart to furnish a just and fair opportunity for the notices printed therein being seen, and allowing interested parties, both residents and non-residents, an opportunity of appearing and being heard.

This construction would result in sustaining the validity of the act, but in setting aside the authority exercised thereunder by the defendant in error; the authority so exercised, as well as the validity of the act, being brought into question by the assignment of errors heretofore made.

"Due process of law" does not mean mere legislative enactments nor simple compliance with the forms of law; such a construction would render the restriction nugatory, and turn this part of the constitution into mere nonsense.

Scott vs. Toledo, 1 L. R. A. 688, 694.

ORDINANCES.

From the *Printed record* (*page 55*) it would appear that Ordinance No. 301 was published on the 12th day of February, 1896. We believe this to be an error, as we understand this ordinance to have been published March 22d, 1895, although there is nothing in the record to that effect. This is, however,

immaterial, as this ordinance in no manner relates to the improvement in controversy, it being merely a general ordinance for the purpose of supplementing the re-assessment act in the method of procedure to be followed.

Ordinance No. 310 (*Printed record, 58*) can in no manner support the notice given, for the reason that this ordinance was introduced and passed after the notice was given, and after the hearing was had,—it being an ordinance approving and confirming the validity of the assessment which was fully established and determined prior to the passage of that ordinance.

Ordinance No. 306 (*Printed record, 56*) is the only ordinance that can possibly be construed in support of the notice.

If, however, the notice given is insufficient to constitute due process of law, it cannot be aided by this ordinance, for the following, among other reasons: (1) There is nothing in such ordinance, provisionally or otherwise, making any levy against property to be taxed, and the ordinance was published but once. (2) There is therein no time designated when such levy will be made, or a time or place specified when or where objections can be filed or heard. (3) Under the act a different manner of giving notice is expressly provided for. (4) Ordinances of a municipality are not binding upon non-resident property owners who remain without the limits of such city.

Dillon on Municipal Corporations, 4th ed., section 308, was relied upon to the effect that ordinances within the municipality have the force of laws. By an examination of the note to the above section, and also of sections 354 to 356, inclusive, it will be seen that the ordinances referred to appertain to the *police* power of the municipality, and not to property matters of the character in question, and that in no event are stran-

gers, who remain without the city, chargeable with notice of such ordinances.

If the notice is insufficient unaided by the ordinance, and the ordinance is inapplicable as to non-inhabitants, then the whole assessment must fall, as the legislature could not have been presumed to have provided for the collection of street assessments only against resident owners.

Stiles vs. Skagit County, 10 Wash., 388.

Under the repeated holdings of the Supreme Court of this state, the city, in the matter of collecting street grade assessments, acts as the trustee for the benefit of the warrant holders, and any losses arising by reason of the failure to collect must fall upon the warrant holders, and not upon the city.

Wilson vs. City of Aberdeen (Wash.), 52 Pac. Rep., 524.
German-American Savings Bank vs. City of Spokane, 17 Wash., 315.

This being true, it is a serious question if the whole procedure for a hearing before the council, and appeal to the superior court, provided for in the re-assessment act, should be held not to be a proceeding *in rem*, but should be construed to be a proceeding adverse to the interest of the property owner.

At the time the property owner is required to appear and file objections, no levy has been created against his property or lien established thereon, nor is any possession thereof taken. On the contrary, he is required to appear and show cause why a lien should not be established against his property.

If this construction be maintained, then the notice provided for by the re-assessment act, and the notice actually given thereunder, are each insufficient to obtain jurisdiction of either the person or the property of the property owner, and the same

is therefore insufficient to meet the requirements of due process of law.

State vs. Guilbert, (O.) 47 N. E. Rep., 551-556-557.

Plaintiff in error contends that it is entitled to a reversal and respectfully asks for a decision reversing the decrees of the lower courts, and dismissing the suit originally brought by the defendant in error.

Respectfully submitted,

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